

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LINDABETH RIVERA and JOSEPH
WEISS, individually and on
behalf of all others similarly
situated,

Plaintiffs,

vs.

GOOGLE, INC.,

Defendant.

No. 16 C 2714

Chicago, Illinois
October 20, 2017
9:45 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - HEARING
BEFORE THE HONORABLE JUDGE EDMOND E. CHANG

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1 (Whereupon, a phone call was placed in open court.)

09:43:52 2 THE COURTROOM DEPUTY: 16 C 2714, Rivera versus
09:43:57 3 Google.

09:43:59 4 THE COURT: I will ask the lawyers in court to
09:44:00 5 announce their appearances.

09:44:02 6 MR. MILIAN: Good morning, Your Honor. David Milian
09:44:04 7 with Carey, Rodriguez, Milian, Gonya for the plaintiff. With
09:44:07 8 me is my colleague, Frank Hedin, and also co-counsel Brad King
09:44:09 9 of the Ahdoot Wolfson firm.

09:44:09 10 MR. HEDIN: Good morning.

09:44:14 11 MR. KING: Bradley King of Ahdoot & Wolfson, counsel
09:44:18 12 for plaintiffs. Good morning, Your Honor.

09:44:18 13 MR. MILIAN: And we also have our co-counsel, Tina
09:44:22 14 Wolfson, of the Ahdoot Wolfson firm on the phone.

09:44:27 15 THE COURT: All right. And then for the defense?

09:44:27 16 MS. WOLFSON: Good morning.

09:44:28 17 MS. FAHRINGER: Good morning, Your Honor. Susan
09:44:29 18 Fahringer and Debra Bernard of Perkins Coie. And with us on
09:44:33 19 the phone is Sunita Bali from Perkins Coie as well.

09:44:38 20 MS. BALI: Good morning.

09:44:39 21 THE COURT: All right. Good morning.

09:44:40 22 Okay. What is the status of the case?

09:44:41 23 MR. MILIAN: Your Honor, from the plaintiffs'
09:44:42 24 perspective, some documents have been produced on a rolling
09:44:46 25 basis by Google.

09:44:48 1 We have been meeting and conferring as to specific
09:44:51 2 search terms that are going to be employed pursuant to the
09:44:57 3 Court's ESI order that the parties stipulated to.

09:45:02 4 We expect a letter today to go out to Google,
09:45:06 5 although we've exchanged multiple letters, we expect that
09:45:08 6 today's letter will be our final letter as to the search terms
09:45:13 7 that plaintiff believes are necessary. We believe we're very
09:45:16 8 close, and we might have that issue resolved today or early
09:45:20 9 next week. And if we don't, if there is any need, we'll bring
09:45:23 10 it before Your Honor as soon as we can. But we expect the
09:45:27 11 search term issue to be resolved without any further
09:45:30 12 litigation over it.

09:45:31 13 The other issue is identifying custodians. We've had
09:45:36 14 multiple meets and confers. We've exchanged multiple letters
09:45:39 15 back and forth. While we've agreed on a handful of
09:45:44 16 custodians, there is a dispute. Plaintiff believes an
09:45:46 17 additional at least four custodians that Google has, at least
09:45:52 18 to date, stated that they are unwilling to designate as
09:45:55 19 custodians. We believe they're necessary.

09:45:58 20 These four individuals were the authors of a paper
09:46:01 21 called the FaceNet paper, which is the paper setting forth the
09:46:05 22 details of how the technology for Google Photos and the face
09:46:09 23 recognition technology works.

09:46:11 24 It's our experience from other BIPA cases that these
09:46:17 25 types of papers and the authors of the papers and what they

09:46:20 1 did in connection and their communications are very important.

09:46:24 2 So we hope we can resolve that. Up until this point,
09:46:26 3 we haven't been able to. And obviously, Your Honor, if we are
09:46:30 4 unable to resolve it, we will shortly be bringing that before
09:46:33 5 Your Honor as well.

09:46:34 6 We have some running disputes. Again, there has been
09:46:37 7 a rolling production by Google, but we still have some
09:46:40 8 disputes as to categories of documents that related
09:46:45 9 specifically to the FaceNet paper and the communications among
09:46:49 10 the authors of the FaceNet paper, and also we've raised this
09:46:55 11 as well, in light of Your Honor's order last time bifurcating
09:47:01 12 class and merits discovery, we don't believe that Google's
09:47:04 13 responses to date have clearly delineated whether or not
09:47:08 14 they're withholding documents based on their view that it
09:47:13 15 constitutes class as opposed to merits discovery. Hopefully,
09:47:17 16 we can work that out. We've been trying to. And if we can't,
09:47:21 17 we'll bring it before Your Honor in the ordinary course.

09:47:24 18 The other point, one other issue that we'd like to
09:47:27 19 mention, last month in a similar BIPA case -- Your Honor
09:47:35 20 mentioned that you wanted the parties to address standing at
09:47:39 21 the earliest possible time. In a similar BIPA case, my firm
09:47:44 22 is class counsel for the plaintiff, Monroy versus Shutterfly,
09:47:46 23 Judge Gottschall last month entered an order citing Your
09:47:50 24 Honor's order in this case on the substantive interpretation
09:47:53 25 of the statute, but also finding sue sponte that the

09:47:57 1 plaintiffs there have Article 3 standing based on privacy
09:48:00 2 violation allegations and the intent of the statute. We're
09:48:05 3 happy to provide Your Honor with a copy of that case.

09:48:08 4 And from the plaintiffs' perspective, that's the
09:48:15 5 status of the case.

09:48:15 6 THE COURT: All right.

09:48:16 7 And how about from the defense?

09:48:16 8 MS. FAHRINGER: I'll take those in order.

09:48:18 9 First on search terms, I hope that the parties are
09:48:21 10 near agreement, and we certainly have been working toward that
09:48:24 11 end. I think it is quite possible that we'll reach agreement
09:48:28 12 within the next week.

09:48:28 13 The Court should be aware that where we're at is that
09:48:31 14 I think the search terms proposed by the plaintiffs, even for
09:48:34 15 four of the custodians that we've agreed to -- we've so far
09:48:38 16 agreed to a total of seven -- for those four, it would result
09:48:42 17 in 2.5 million hits, which would take over a year to review,
09:48:46 18 and the search terms ask for things like group photos. So we
09:48:51 19 are struggling with that issue, and we hope we can resolve it,
09:48:55 20 but we might not be able to.

09:48:56 21 Second, on custodians, the custodians that we've
09:49:00 22 proposed all have experience and knowledge and are the
09:49:05 23 pertinent custodians and the right custodians with respect to
09:49:10 24 Google Photos.

09:49:12 25 What the new custodians that the plaintiffs are

09:49:15 1 asking for, who they are, number one, is the executive
09:49:19 2 chairman of Google's parent company, Alphabet, and we think
09:49:24 3 there's no basis to seek his -- to insist on his being a
09:49:28 4 custodian.

09:49:30 5 The other three that they're seeking are the authors
09:49:32 6 of the FaceNet paper that they're referring to. One version
09:49:37 7 of FaceNet is used in Google Photos. We are -- our custodians
09:49:42 8 can speak to the use of FaceNet in Google Photos. We see the
09:49:46 9 effort to name these three people as custodians to be an end
09:49:52 10 run around limiting the case to the product at issue in the
09:49:56 11 case.

09:49:57 12 So that's the nature of the dispute with the
09:49:59 13 custodians as well.

09:50:00 14 We are -- again, we have been diligently, I think,
09:50:03 15 working on trying to get a resolution, and Google has gone
09:50:06 16 ahead and produced for the four custodians that we initially
09:50:09 17 proposed and the search terms to which we can agree gone ahead
09:50:13 18 and produced those documents.

09:50:16 19 It's news to me that the plaintiffs don't think we
09:50:19 20 have clearly delineated our objections. I don't think we
09:50:23 21 could have been any more clear in our objections, but we'll
09:50:26 22 try to resolve that as well.

09:50:27 23 Finally, as to the plaintiffs' discovery, we've also
09:50:31 24 got a few loose ends to tie up on the plaintiffs' discovery
09:50:35 25 and are awaiting some answers and further information on that.

09:50:39 1 We've asked for depositions of the plaintiffs with an
09:50:42 2 eye toward, again, prioritizing standing discovery. We've
09:50:48 3 asked for those depositions in December. Haven't heard back
09:50:48 4 as to dates, but hope to have those settled soon.

09:50:53 5 And we think that we should be in a position to bring
09:50:55 6 an early motion for summary judgment as soon as the discovery
09:51:00 7 of the plaintiffs is completed, which I think would probably,
09:51:03 8 based on scheduling and the holidays, probably put us at early
09:51:06 9 next year before the close of discovery.

09:51:06 10 THE COURT: What would be the basis for the early
09:51:09 11 summary judgment motion?

09:51:10 12 MS. FAHRINGER: Thank you, yes.

09:51:14 13 The basis would be Article 3 standing. We think it
09:51:18 14 also would be -- I'm sorry -- Article 3 standing, and in
09:51:18 15 addition, we think it probably would be most efficient to
09:51:21 16 address a few other defenses we have that are based on the
09:51:24 17 absence of injury, that the plaintiffs aren't aggrieved under
09:51:28 18 the statute as the statute requires, and addressing liquidated
09:51:32 19 damages, whether that can be awarded without suffering any
09:51:35 20 actual damage.

09:51:36 21 And then finally, the -- there is a -- it depends on
09:51:41 22 how discovery proceeds, but there is a possibility that we'd
09:51:44 23 have one more issue be ripe for summary judgment at that
09:51:48 24 point, which is agreement to the terms of service, because we
09:51:51 25 think there is a possibility that agreement to the terms of

09:51:56 1 service would provide that California law applies would
09:52:00 2 preclude a claim under BIPA.

09:52:06 3 So that would be our -- that's our thought right now
09:52:08 4 as to what would make the most sense to try to resolve early
09:52:12 5 before trying to resolve the more tangled issues, the more
09:52:14 6 complex issues, which we would hope to have in a later summary
09:52:18 7 judgment motion with the Court's permission.

09:52:22 8 THE COURT: All right.

09:52:23 9 Let me set some deadlines so that -- and don't worry,
09:52:30 10 I'm not granting leave for them to do that, I'll set a
09:52:34 11 deadline for that as well, but I want make sure we just keep
09:52:36 12 moving forward to March 5th as of right now.

09:52:39 13 So, to do that, the dispute over the search terms, if
09:52:43 14 you don't have resolution on that -- and by resolution I mean
09:52:49 15 if there's an agreed subset of the search terms, you ought to
09:52:53 16 run those and disclose the documents and keep moving forward
09:52:57 17 there. But if there is some -- if some subset is still
09:53:09 18 disputed, then to just bring it to a head, let's have -- we'll
09:53:14 19 start with the plaintiff to move to compel so that you can
09:53:18 20 explain the rationale for why the search terms would generate
09:53:22 21 relevant information, and then we'll have the defense
09:53:25 22 resistance to that.

09:53:30 23 And, so let's see, if you talk for another week or
09:53:33 24 so, then let's make that motion due on October -- well, let's
09:53:39 25 say November 1, okay?

09:53:48 1 And then the response will be due November 8.

09:53:57 2 I don't know if we really need a reply on the search
09:54:01 3 term dispute. But, let's see, the Monday after is the 13th,
09:54:10 4 so November 13 if you're going to reply on that.

09:54:16 5 Is the -- it sounds like the one custodian over which
09:54:22 6 there is not a disagreement in terms of producing for a
09:54:26 7 deposition -- right, is there one at least?

09:54:29 8 MS. FAHRINGER: There's no deposition -- plaintiffs
09:54:31 9 haven't asked for any depositions. This is all only
09:54:34 10 custodians for documents.

09:54:35 11 We certainly do not agree that the executive chairman
09:54:39 12 of Google's parent company should be a custodian.

09:54:43 13 THE COURT: Yeah, no, no, I just -- maybe I -- I
09:54:46 14 understand there are custodians, but also, were these
09:54:49 15 individuals that you would then think of -- you would think
09:54:52 16 you would depose later on to understand how the technology
09:54:55 17 works?

09:54:55 18 MR. MILIAN: We have four custodians that we've
09:54:58 19 agreed to so far, and they have produced documents.

09:55:00 20 There are an additional four custodians that the
09:55:03 21 plaintiffs would like, three of whom were authors of the
09:55:07 22 technical paper called FaceNet, which we think is critical
09:55:13 23 because it describes the technology.

09:55:15 24 The other one is, and I'd like to just very quickly,
09:55:18 25 the chairman of Google, we're not seeking to depose him, but

09:55:21 1 we think he is an important records custodian because he was
09:55:25 2 interviewed and has made statements in the public concerning
09:55:28 3 this particular technology and why it would be invasive of
09:55:32 4 privacy and why it shouldn't be rolled out. So documents
09:55:37 5 related to that, and those are public statements that are
09:55:37 6 contained in press articles.

09:55:39 7 We think that document search should be done with
09:55:42 8 respect to that individual's documents.

09:55:46 9 Depositions would be an entirely different
09:55:46 10 discussion.

09:55:50 11 THE COURT: Okay. No, then that's fine. I thought
09:55:54 12 you had put a -- you're describing these persons as custodians
09:55:57 13 for the purposes of the current dispute, that you foresaw that
09:56:02 14 they would be the likely individuals for depositions, and the
09:56:06 15 only reason I -- so I had linked those two in my mind in terms
09:56:10 16 of a future plan, and then -- but if there was some deposition
09:56:13 17 that could be taken care of -- but that's fine, so let's just
09:56:17 18 go back in time --

09:56:19 19 MR. MILIAN: Just to clarify, we think that at least
09:56:20 20 right now everyone except for Schmidt, the CEO, would be a --
09:56:25 21 well, a future deposition that we would want to take. Schmidt
09:56:29 22 we would leave to be determined, based on the other
09:56:32 23 depositions. Right now, we're really disputing whether he
09:56:35 24 should be a records custodian for purposes of doing a search
09:56:38 25 of his records.

09:56:39 1 THE COURT: Okay. I was just trying to see if there
09:56:42 2 was a way to move forward on some piece and not others as to
09:56:46 3 this specific dispute, and right now there is not. So we will
09:56:50 4 leave it there for now.

09:56:52 5 We have this -- okay. So the search terms compulsion
09:57:02 6 motion schedule is set.

09:57:06 7 Then with respect to whether -- has the discussion
09:57:11 8 advanced sufficiently far enough in terms of whether certain
09:57:14 9 individuals, and maybe it's just the executive chairman, would
09:57:17 10 be subject to the search terms at all, that the -- that that
09:57:22 11 can be briefed as of November 1, or not?

09:57:26 12 MR. MILIAN: We think that if we don't reach
09:57:29 13 agreement by -- you know, within the next week or so, that we
09:57:35 14 would want to be teeing that issue up as well.

09:57:41 15 THE COURT: Okay. So just include that as well. So
09:57:44 16 it's not only a motion to compel a search using terms 1, 2, 3,
09:57:47 17 but it's also we would like these to be applied -- not just
09:57:50 18 these, but the ones that were not subject to a dispute, be
09:57:53 19 applied to certain individuals.

09:57:55 20 So we will just put that all together.

09:57:57 21 MR. MILIAN: Very good, Your Honor.

09:58:02 22 THE COURT: Okay. Is that schedule realistic then
09:58:04 23 with that added issue in there?

09:58:06 24 MR. MILIAN: Pardon me, Your Honor?

09:58:08 25 THE COURT: Is that schedule realistic with that

09:58:11 1 added issue in there?

09:58:13 2 MR. MILIAN: I think it works, Judge. If you would
09:58:16 3 give us an extra week on all of those dates, that probably
09:58:19 4 would be more helpful.

09:58:20 5 MS. FAHRINGER: The custodians are probably the
09:58:22 6 simplest part of the motion.

09:58:23 7 THE COURT: Okay. Well, let's just leave it here
09:58:25 8 then. If have you a problem, you can ask for an extension.

09:58:28 9 MR. MILIAN: And that's fine.

09:58:29 10 THE COURT: All right.

09:58:31 11 And then, let's see, the other interim deadline -- so
09:58:40 12 the December deposition scheduling should not be a problem?

09:58:44 13 MR. MILIAN: Judge, we would just -- it shouldn't be
09:58:48 14 a problem. We were just provided, you know, that request last
09:58:52 15 week on Monday. We will check with our client, and, you know,
09:58:58 16 we --

09:58:59 17 THE COURT: Yeah. I mean, it's two months away. It
09:59:01 18 really should be doable.

09:59:02 19 MR. MILIAN: It should be doable, Your Honor, no
09:59:03 20 problem.

09:59:03 21 THE COURT: Right, and if this is the only -- because
09:59:07 22 I'm assuming at this point that for standing purposes, the
09:59:10 23 plaintiffs need not engage in any discovery, right?

09:59:13 24 MR. MILIAN: I don't -- I don't agree with that,
09:59:16 25 Judge.

09:59:17 1 I think that before a summary judgment motion is
09:59:20 2 brought on any issue, discovery as to those issues should be
09:59:24 3 complete, and it may very well be that based on the discovery
09:59:28 4 we receive from Google that there are admissions contained in
09:59:32 5 those documents as to the privacy intrusion, the level of the
09:59:35 6 privacy intrusion, those things that go directly to what would
09:59:39 7 be our primary argument on why there is standing.

09:59:42 8 THE COURT: Okay. So you are pursuing that now
09:59:45 9 though?

09:59:45 10 MR. MILIAN: We are. We're in the process of
09:59:47 11 pursuing that now.

09:59:48 12 THE COURT: Okay.

09:59:48 13 MR. MILIAN: But we don't have a conclusion date as
09:59:51 14 to when all those documents are going to be produced.

09:59:54 15 THE COURT: Okay.

10:00:00 16 So it is -- let's see. I'm trying to set these
10:00:05 17 incentives just correctly here.

10:00:09 18 If you want to obtain authorization for an early
10:00:18 19 summary judgment motion, and we're kind of calling it that,
10:00:23 20 even though it's jurisdictional, only because there's some
10:00:27 21 fact finding to be done, but if you want to do that without
10:00:30 22 getting a 56(d) response from them, then you need to
10:00:36 23 prioritize and be as forthcoming on those standing-specific
10:00:41 24 issues as soon as practicable.

10:00:58 25 And out of all the issues that were mentioned in the

10:01:01 1 potential -- a potential early summary judgment motion, that's
10:01:05 2 the one that by law ought to be elevated, first and foremost.
10:01:11 3 I'd be much more skeptical about other statutory issues,
10:01:18 4 especially damages issues, being briefed earlier rather than
10:01:22 5 later unless there can be a convincing case that it would help
10:01:28 6 resolve the case.

10:01:31 7 So that I think I will just flag, that you need to
10:01:38 8 seek leave and explain why those issues are not only factually
10:01:47 9 ready for summary judgment and that discovery is complete on
10:01:54 10 those issues, but also why we ought to take the time to
10:01:57 11 consume everyone's resources before the usual -- in the
10:02:00 12 ordinary course, where you close discovery and then have the
10:02:03 13 dispositive motion.

10:02:05 14 Now, on standing, though, because that is --
10:02:09 15 obviously goes to subject matter jurisdiction, I'm just trying
10:02:19 16 to think whether I ought to set an interim deadline to get
10:02:31 17 that discovery done.

10:02:31 18 What do you think about doing something like that?

10:02:34 19 MS. FAHRINGER: (Nodding head.)

10:02:35 20 MR. MILIAN: That's fine, Your Honor.

10:02:36 21 MS. FAHRINGER: We would be in favor of that.

10:02:38 22 THE COURT: Well, and what timing would you think?

10:02:40 23 MS. FAHRINGER: End of December.

10:02:41 24 MR. MILIAN: That's fine. That works.

10:02:42 25 MS. FAHRINGER: It depends, of course, on what -- on

10:02:46 1 what it is that you -- that the plaintiffs identify as needing
10:02:49 2 for that discovery. We don't know the answer to that right
10:02:52 3 now, so --

10:02:53 4 THE COURT: All right. So the -- that's why -- and I
10:02:56 5 do think, from the defense perspective, the only discovery
10:02:59 6 that you need is taking the plaintiffs' depositions.

10:03:05 7 MS. FAHRINGER: (Nodding head.)

10:03:06 8 THE COURT: Okay. So, yeah, let's definitely get
10:03:08 9 that done obviously before -- all right. So I'll call it
10:03:12 10 December -- 11, 18, 25, 29 -- all right. So December 29 will
10:03:27 11 be an interim deadline to conclude any standing -- any
10:03:31 12 discovery needed for standing purposes.

10:03:36 13 Yeah, and if you want to avoid ruining your holidays,
10:03:40 14 you know, please accelerate that. I'm not trying to set that
10:03:42 15 deadline as, you know, some -- out of some cruelty. But
10:03:45 16 the -- for it to make any sense before March 5th, it does have
10:03:49 17 to be in advance of --

10:03:53 18 MR. MILIAN: Absolutely, Your Honor.

10:03:55 19 THE COURT: -- March 5th to make sense that if it's
10:03:57 20 truly something that is a problem, then we can resolve it
10:03:59 21 sooner rather than later.

10:04:00 22 MR. MILIAN: Judge, I also heard, I think, for the
10:04:02 23 first time an argument that the defendant intends to raise
10:04:05 24 regarding the choice of law and venue as to --

10:04:08 25 MS. FAHRINGER: Not venue.

10:04:09 1 MR. MILIAN: It's just choice of law? And we think
10:04:12 2 that that's been waived.

10:04:14 3 That's our position, but we are happy to, you know,
10:04:17 4 meet and confer before any motion on, you know, which choice
10:04:21 5 of law applies.

10:04:24 6 THE COURT: Yeah, no, I remember flagging something
10:04:26 7 about this way earlier, but -- okay. It's not something that
10:04:29 8 we can necessarily resolve now.

10:04:38 9 Oh, that, too, you were waiting for the depositions
10:04:40 10 and --

10:04:40 11 MS. FAHRINGER: I'm sorry?

10:04:44 12 THE COURT: Were you waiting on the plaintiffs'
10:04:46 13 depositions --

10:04:46 14 MS. FAHRINGER: Right.

10:04:46 15 THE COURT: -- to make a final decision on that?

10:04:49 16 Okay. I think those are the only interim deadlines
10:04:57 17 that make sense to set right now.

10:04:59 18 So let's set a status then for the week of --
10:05:14 19 actually, let's see. So November 20th is the Monday of
10:05:17 20 Thanksgiving week. Can you make a status? You can appear by
10:05:22 21 phone if you want.

10:05:23 22 MR. MILIAN: If we can appear by phone, that would be
10:05:25 23 fine, Your Honor.

10:05:26 24 THE COURT: Okay.

10:05:28 25 MR. MILIAN: And we can have our local counsel

10:05:31 1 present in the courtroom as well.

10:05:32 2 THE COURT: Yeah, my guess is that the briefing on
10:05:34 3 the motion to compel the search terms will be sufficiently
10:05:37 4 thorough, and then I may decide it without any additional
10:05:40 5 argument altogether, but I just want to have that date kind of
10:05:44 6 as a placeholder.

10:05:45 7 But if I end up needing it, then you can participate
10:05:48 8 by phone. That's not a problem.

10:05:51 9 So I guess we can just pick a time on November 20,
10:05:54 10 Sandra.

10:05:54 11 THE COURTROOM DEPUTY: We can do 9:30, Judge.

10:06:00 12 THE COURT: All right.

10:06:02 13 Okay. Anything else for today?

10:06:03 14 MR. MILIAN: Not today. Thank you, Your Honor.

10:06:05 15 MS. FAHRINGER: No, Your Honor.

10:06:06 16 THE COURT: Okay. Thank you.

10:06:06 17 MR. MILIAN: Thank you, Your Honor.

10:06:08 18 MS. FAHRINGER: Thank you.

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20 (Proceedings concluded.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/s/Krista Burgeson, CSR, RMR, CRR January 15, 2018
Federal Official Court Reporter Date